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IN THE

Supreme Court of the United States

October Term, 1949

No. 300

STATE OF MARYLAND, *Petitioner*

v.

THE BALTIMORE RADIO SHOW, INC.,
a body corporate, WFBR,

THE BALTIMORE BROADCASTING CORPORATION,
a body corporate, WCBM,

MARYLAND BROADCASTING COMPANY,
a body corporate, WITH,

and

JAMES P. CONNOLLY, *Respondents.*

BRIEF OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AS AMICUS CURIAE.

AMERICAN NEWSPAPER PUBLISHERS
ASSOCIATION,

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September 26, 1949.

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BRIEF OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AS AMICUS CURIAE.

This brief is submitted by the American Newspaper Publishers Association as amicus curiae in opposition to the petition for a writ of certiorari filed by the State of Maryland in the above-entitled case.

STATEMENT OF THE CASE.

In the interest of brevity this amicus curiae will make no separate statement of the case.

INTEREST OF THE AMICUS CURIAE.

The American Newspaper Publishers Association is a membership corporation organized and existing under the laws of the State of New York. Membership in the Association is confined to publishers of daily and/or Sunday newspapers. This membership embraces more than 780 newspaper publishers whose publications represent approximately 90% of the total daily and Sunday circulation of newspapers published in the United States.

The Association is vitally interested in the issue presented in these cases, namely, as to the right of persons to publish,—free from censorship or intimidation by the court,—news stories concerning matters of great public interest which may come before a court.

This particular controversy arose over the citation of respondents by the Criminal Court of Baltimore City to show cause why they should not be held in contempt for violation of Rule 904 of that court.[1] Rule 904 prescribes certain conditions under which crime news may be or shall not be published within the jurisdiction of the court. Upon the trial respondents were held guilty and fines were levied against them. Upon appeal from the judgments of conviction, the Court of Appeals of the State of Maryland set aside the convictions and held the rule invalid.

Among the functions of the daily newspaper press is the gathering and dissemination of information in the form of news and editorial comment.

News is factual information concerning matters of public importance that in the judgment of the editor is of sufficient general interest to warrant its publication.

Editorial comment is discussion of such matters from the analytical or critical viewpoint. It includes expression of opinion.

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[1] The citations as particularized state:

"That the contempt proceedings are based upon Rule 904 of the Rules of the Supreme Bench of Baltimore City.

"That said proceedings also are based upon the general power and authority of the Courts to issue citations for contempts for the protection of a prisoner's right to a fair trial." (R. 9, 81, 151).

This amicus curiae submits that the judgment of the trial court herein and those portions of Rule 904 of the Supreme Bench of Baltimore City upon which it was based constituted an abridgement of the foregoing functions of a free press as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States and that the Court of Appeals of Maryland, in reversing the trial court's judgment, correctly applied the rules laid down by this Court in *Bridges* v. *California*, 314 U. S. 252 (1941); *Pennekamp* v. *Florida*, 328 U. S. 331 (1946) and *Craig* v. *Harney*, 331 U. S. 367 (1947).

CONSTITUTIONAL PROVISIONS INVOLVED.

The First Amendment to the Constitution of the United States is as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The pertinent portion of the Fourteenth Amendment to the Constitution of the United States is as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

THE RULE IN CONTROVERSY.

Rule 904 of the Supreme Bench of Baltimore City is as follows:[2]

[2] In the trial court Judge Gray held paragraph E invalid but sustained the validity of other portions of the rule (R. 62-65). The Court of Appeals of Maryland held the rule invalid in its entirety (R. 221). In its petition for a writ of certiorari petitioner does not attempt to defend the rule and thereby, it must be assumed, admits its invalidity.

"In connection with any case which may be pending in the Criminal Court of Baltimore, or in connection with any person charged with crime and in the custody of the Police Department of Baltimore City, or other constituted authorities, upon a charge of crime over which the Criminal Court of Baltimore has jurisdiction, whether before or after indictment, any of the following acts shall be subject to punishment as contempt:

"A. The making of photographs of the accused without his consent.

"B. The making of any photograph in violation of Rule 3 hereof.

"C. The issuance by the police authorities, the State's Attorney, counsel for the defense, or any other person having official connection with the case, of any statement relative to the conduct of the accused, statements or admissions made by the accused, or other matter bearing upon the issues to be tried.

"D. The issuance of any statement or forecast as to the future course of action of either the prosecuting authorities or the defense relative to the conduct of the trial.

"E. The publication of any matter which may prevent a fair trial, improperly influence the court or the jury, or tend in any manner to interfere with the administration of justice.

"F. The publication of any matter obtained as a result of a violation of this rule." (R. 29-30).

BACKGROUND OF THIS CONTROVERSY.

In 1948, this country experienced an unprecedented wave of sex crimes ranging from rape, mutilation and murder of extremely young and innocent children to the same offenses against elderly women. The crimes were so widespread as to excite national concern. No matter was of more importance than the apprehension, trial and punishment of the loathsome felons guilty of these offenses except the rooting up of the evil itself by ascertaining the causes for such abnormal offenses and means for their pre-

vention and eradication. It would unnecessarily burden this Court's time to cite the many unfortunate incidents that occurred and to show how they were treated in the news and editorial columns of newspapers published in every state except the State of Maryland (particularly the City of Baltimore) and in radio broadcasts of news. Request is made for judicial notice thereof.

The convictions herein were based upon the publication of admittedly correct news reports concerning the arrest of a confessed murderer.

On the early afternoon of July 6, 1948, 11-year-old Marsha Brill was stabbed to death while riding her bicycle with playmates in the northwestern section of Baltimore (R. 21). Nine days earlier, 11-year-old Carol Bardwell had been slashed to death while riding her bicycle through Rock Creek Park in Washington, 40 miles away. As the trial judge found:

> "The impact of those two similar crimes upon the public mind was terrific. The people throughout the City were outraged. Not only were they outraged but they were terrified. Certainly, any parent of a young child must have felt a dread at the thought that his or her child might be killed while out upon the thoroughfares of Baltimore City. We think we are justified in drawing the conclusion that there was widespread and compelling public interest in the Brill Murder." (R. 57-58).

The slayer was arrested and confessed to both murders. Under Rule 904 of the Supreme Bench of Baltimore City, the Baltimore newspapers and radio stations were silenced as to many of the details of the crime and the facts of the killer's past criminal record and his confession. The Washington papers, however, printed the stories and when the facts which they printed were broadcast over the Baltimore radio stations the latter were cited for contempt.

At the time the broadcasts were made, the slayer was in police custody and had not been presented to or indicted by the Grand Jury (R. 22, 25-27). The facts which were

published were obtained from the Police Commissioner who knew that the facts were to be used in a news story (R. 22-23).

PRELIMINARY STATEMENT.

Probably no more stringent rule for censorship of the press and control of the dissemination of important information concerning crime has ever been laid down in this country than is to be found in Rule 904 of the Supreme Bench of Baltimore City.

In effect it subjects every newspaper and every broadcaster within the jurisdiction of the court to punishment unless in advance of publication approval of the matter published is obtained from the court. It not only restrains publication of matters actually before the court but publication of matters that have not even reached the court.

The rule was adopted in 1939, prior to this Court's decision in the *Bridges* case, *supra*. The record in this case clearly shows that Rule 904 was based on English precedents and on the now-discredited notion that the courts of this country have power to punish any publication which will "tend to impede" the administration of justice.[3]

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[3] In the trial court the parties stipulated that an address of Judge Emory H. Niles before the Maryland State Bar Association on June 28, 1940, might be referred to for the history and background of Rule 904 (R. 28). Judge Niles was a member of the Supreme Bench of Baltimore City at the time Rule 904 was adopted and was one of the two judges who issued the contempt citations herein (R. 5).

In his address to the Maryland State Bar Association Judge Niles stated that the true issue as to a court's power to punish for contempt by publication is:

> "Does the right of the newspapers to inform the public upon public questions entitle the newspapers to distribute either information or opinion which will *tend* to impede the Court in its function of administering impartial justice?" (Emphasis supplied).

It is evident that this statement of the issue does not meet the "clear and present danger test" or even the "reasonable tendency" test enunciated in *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402 (1918).

At a later point in his address Judge Niles stated that:

> "there is no difference whatever, as far as I can determine, between the theory of the English and that of the American Courts on either phase of indirect contempt."

Judge Niles also stated that publication of the fact that the accused "was unable to eat any breakfast; or that he spent a sleepless night" tends to prevent a fair trial and is therefore punishable in contempt proceedings (45 Transactions of Maryland Bar Association 101 (1940)).

In his Bills of Particulars the State's Attorney stated that the contempt proceedings herein were "based upon Rule 904" and "also * * * upon the general power and authority of the Courts to issue citations for contempts" (R. 9, 81, 151).

The trial judge held that paragraph E of Rule 904 was invalid, but nevertheless held respondents in contempt. The convictions were based on other paragraphs of Rule 904, and on the court's general power to cite for contempt (R. 62-65,72). The trial judge approved the practice under Rule 904 whereby editors submitted news stories to the judges for approval prior to publication (R. 69).

The Court of Appeals reversed the judgments of conviction on the ground that Rule 904 was invalid and because the publications involved herein did not present a "clear and present danger" to the fair administration of justice (R. 230-231).

In its petition for certiorari the State of Maryland does not attempt to defend Rule 904 but seeks to narrow the issue by discussing merely the general power of courts to cite for contempt.[4]

ARGUMENT.

The Petition Herein Should be Denied on the Strength of this Court's Decision in Bridges v. California, 314 U. S. 252, Pennekamp v. Florida, 328 U. S. 331, and Craig v. Harney, 331 U. S. 367.

The petition should be denied for the reason that what petitioner is really asking this Court to do is reconsider and reverse the *Bridges* case and reinstate the old English

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[4] The issue may not be narrowed so readily. Rule 904 is an essential part of this proceeding.

The convictions herein stem from the attempted enforcement of an unconstitutional rule and from an attempted exercise of censorship without parallel in this country. The judgment of the Court of Appeals could be affirmed solely on the ground that Rule 904 and the censorship exercised thereunder brought about "a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview" and that therefore the rule and the practice which had grown up thereunder should be stricken down in its entirety. *Thornhill* v. *Alabama*, 310 U. S. 88, 97 (1940).

common law rule governing contempt by publication. Petitioner would have this Court abandon the doctrine laid down in the *Bridges* case to measure "the power of all American courts, both federal and state, including this one," 314 U. S. at page 260, and thereby perpetuate the censorship power which the Supreme Bench of Baltimore City for a decade has exercised over all crime news.

In the decision sought to be reviewed, the Court of Appeals of Maryland held that petitioner had failed to prove that the broadcasts herein constituted a "clear and present danger" to the fair administration of justice. Although the petition lists three "questions presented," the three are merely variations of a single question, namely

> Whether the Court of Appeals erred in holding that petitioner had failed to show a "clear and present danger" to the fair administration of justice.

It is submitted that this issue was correctly decided by the Court of Appeals; that the question is not one "of substance not theretofore determined by this Court;" that, on the contrary, the Court of Appeals meticulously followed the rule laid down by this Court in the *Bridges* case and reiterated in the *Pennekamp* and *Craig cases.*

Petitioner argues that publication of the fact of any confession constitutes a "clear and present danger" to the administration of justice.[5] The Court of Appeals of Maryland rejected this argument. In addition to relying on decisions of this Court, the Court of Appeals relied on several Maryland cases including *Downs* v. *State,* 111 Md. 241 (1909) and *Newton* v. *State,* 147 Md. 71 (1924).

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[5] Petitioner also relies on "other facts made known by the Respondent's broadcasts,—that James was not mentally unsound, that he had been convicted of other crimes, that he had served other sentences, and that he had confessed to other crimes" (Petitioner's Brief, page 30). Principal reliance, however, is placed on publication of the fact that James had confessed.

CONCLUSION.

Wherefore, this amicus curiae submits that the decision of the Court of Appeals of Maryland correctly applied the rules laid down by this Court, that the petition presents no issue for this Court to determine, and therefore, that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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